United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

851

BRIEF FOR APPELLANT

UNITED STATED COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,970

PERFECTO MENESES

Appellant

v.

SECRETARY OF HEALTH, EDUCATION
and WELFARE

APPEAL FROM THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED

In the opinion of appellant, the following issues are presented:

1. Is there substantial evidence to support the decision of the Secretary of Health, Education and Welfare:

a. As to applicant's medical condition

b. As to available gainful activity opportunities

2. Whether once the applicant has shown that he has a medical impairment which prevents him from doing his former type of work the Secretary has the burden of showing availability of gainful activity opportunities to one with such experience and with such medical impairment as applicant.

3. Whether defendant abided by relevant principles of law.

4. Whether there were gross errors of law and fact on the part of the defendant.

a. Whether it was error to consider work of short duration which he had to quit because of his condition as evidence that applicant was capable of substantial gainful employment.

b. Whether it was error to consider the size of applicant's family in determining whether or not he was disabled.

c. Whether it was prejudicial error for the Hearing Examiner to have considered only part of the evidence and to have ignored the rest.

5. Whether unfairness to the applicant in the administrative process would require remand if reversal were not had.

a. Whether the applicant shoud have been given reasonable opportunity to be heard

b. Whether the applicant should have been provided with legal services.

c. Whether it was proper for the Hearing Examiner to have used material which was not in evidence.

d. Whether the Hearing Examiner should have examined the entire Veteran Administration file on Mr. Meneses.

6. Whether, under the circumstances of this case, there should be a reversal and judgment for the applicant rather than a remand.

This case was not previously before this court.

REFERENCE TO RULINGS

1. Granting Leave To Amend Complaint	June 10, 1969 Transcript of proceedings
2. Granting Leave to Substitute Patrocinia Meneses As Plaintiff	May 22, 1969 Transcript OF Pleadings
3. Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's motion for Summary Judgment	November 25, 1969 Transcript of Pleadings
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STATEMENT OF THE CASE

1. STATEMENT AS TO PROCEEDINGS

The original petitioner was a Filipino, residing in the Philippines. In November 1960, he filed an application for a disability allowance under the Social Security Act. This application was made on a Department of Health, Education and Welfare form, and the application was received by the Veterans Administration in Manila. Tr. 15-18[1] Almost

1. The documentary transcript used by the Hearing Examiner and Appeals Council was filed in the District Court in the form of hard covered-bound set of documents, to which we shall refer as "Tr."

two years later, by a letter from a District Office he was advised his application had been rejected. Tr. 41-43. On appeal, the Appeals Council upheld the decision of the examiner, in a brief concurring opinion. Tr. 1.

On July 8, 1965, petitioner filed another application for a disability allowance alleging disability as of September 30, 1950.[2] Tr. 44-48. After rejection by a district office, the application came before a Hearing Examiner, who, on January 26, 1967, ruled that the petitioner was not entitled to a disability allowance because, allegedly, he had not shown that he had been continuously unable since before September 30, 1950 to engage in substantial gainful work by reason of an impairment of long and indefinite duration or for at least 12 months prior to September 30, 1950. Tr. 10.

With the aid of a Commander of a Disabled Veteran's Post, the petitioner filed a complaint in the District Court for the District of Columbia in 1967. After the case had sat on its calendar for a while the Court appointed an attorney for the petitioner. This appears to be the first time plaintiff was represented by an attorney. Before that attorney took action in the case, the undersigned was substituted for him, in February 1969. In said attorney's opinion the complaint that had been filed was materially

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2. By filling in a box. In his first application plaintiff had alleged that the onset of his disability had occurred on May 20, 1947. The defendant's Nov. 5, 1962 letter of rejection had advised plaintiff that 9/30/50 was the last day on which he met the earnings requirement for coverage purposes.

defective and insufficient, and a motion to amend was made. With the consent of the Government the complaint was amended. Plaintiff's attorney had the Veterans' Administration send its file on Petitioner to Washington where it was reviewed by said attorney. On such review it was discovered, among other things, that the original petitioner had died in August 1968. Patrocinia Meneses, the widow of Mr. Meneses, was substituted as plaintiff. The defendant has advised counsel on both sides that the widow would be entitled to take in place of Mr. Meneses if the latter were entitled to recover.

Defendant had filed a motion for Summary Judgment in 1968. The attorney for the plaintiff filed a cross motion for summary judgment in 1969. After hearing the motions, the District Court granted defendant's motion and denied plaintiff's motion. It did not write an opinion. This appeal followed.

2. STATEMENT AS TO RELIEF REQUESTED

Appellant requests that the District Court's rulings on the motions for Summary Judgment be reversed and that it be held that Perfecto Meneses was entitled to recover disability benefits from defendant, to which benefits his substituted widow is entitled. Alternatively, we ask that the matter be remanded to the defendant for reopening and rehearing.

3. STATEMENT AS TO MATERIAL FACTS

In this case the main factual issue is as to whether the plaintiff's disability was such as to preclude him from substantial gainful employment, since it is not disputed that he had had his "disability" for as long and longer than the statutory period.

The evidence in the case is wholly documentary.

While we propose to recite the record facts in detail we think that a brief summary of certain uncontradicted facts at the outset may shed much light on the evidentiary issue.

Plaintiff joined the army while a high school student. While in the army he suffered a serious heart attack in 1947 and received a medical discharge that year. Between 1947 and 1952 the Veterans' Administration rated him as 100% to 60% disabled. Since 1947, because of his heart ailment he has been in pain and fatigued upon slight or ordinary activity. Outside of his service in the armed forces he has had no work background experience. On two occasions since the onset of his impairment he has attempted to work and had to quit because of his condition after a short time. The defendant offered no evidence as to substantial gainful work opportunities available to the applicant.

4. FACTS

The petitioner was born in the Philippines on September

22, 1910. He served in the armed forces of the United States as a Philippino scout, going into the armed forces prior to finishing high school. Tr. 34-35.

On May 20, 1947, while getting dressed, plaintiff suffered a heart attack, during which he experienced acute substernal pain of a crushing type for a period of at least five hours, and had some difficulty getting his breath. He was ashen-gray in color and in slight shock. His pulse was weak and irregular with premature beats every six beats. Heart sounds were distant with a weak apical impulse and extra systoles heard every six beats. He was put in Fowler's position,[3] given nasal oxygen, and morphine ordered every four hours by the clock.[4] The diagnosis was myocardial infarction due to coronary occlusion.[5] Tr. 24-25. He was hospitalized until October 22, 1947,[6] at which time he was released and discharged from the army because of his heart condition. Tr. 19. An army Medical Board in August of 1947 had found Mr. Meneses "Incapacitated for

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3. Bed elevated at the head. Stedman, Medical Dictionary, 20th Ed.

4. None of the previous four sentences was referred to by the hearing examiner.

5. An infarction has been described as a necrotic change resulting from obstruction of an artery. Stedman, supra. It has also been said that a "myocardial infarction signifies necrosis or death of a portion of heart muscle because of an interruption or curtailment of its blood supply." Friedberg, Diseases of the Heart (3d ed. 1966) 770. Dr. Friedberg states that usually this is the result of an acute coronary occlusion. Ibid.

6. Not referred to in the opinion of the hearing examiner.

further duty because of possibility of subsequent cardiac damage on strenuous activity." When he was discharged he had annoying symptoms of chest pains and palpitation.[7] Tr. 26.

Plaintiff was examined by the Veterans' Administration on October 26-27, 1948. The examiner thought he looked fairly healthy.[7a] His gait was normal. He was given a two minute step test and an electrocardiogram. The two step test, according to the medical examiner, did not bring about dyspnea. The medical examiner thought that although the heart sounds were fairly strong, the findings were suggestive of a healed infarction, but there were residuals of posterior myocardial infarction, and the medical examiner stated that it was impossible to determine present state of activity of myocardial process without serial EKG's. X-rays showed a slight enlargment of the left ventricle and a slight hazing and scarring in the right apex. The plaintiff's complaints were of precardial pains on exertion, nervousness, poor sleep, and a slight shortness of breath on climbing stairs. Between plaintiff's discharge in October 1947 and his 1948 examination he had suffered four

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7. Not referred to in the opinion of the hearing examiner.

7a. Both the Government (Govt's Memorandum In Opposition To Plaintiff's Motion For Summary Judgment, p. 3) and Appellant are in agreement that the medical examiner reported that the applicant appeared to be "fairly healthy" in appearance. See Tr. 80. But in the Hearing Examiner's opinion it is said: "In October 1948, his general appearance was very healthy." Tr. 10, (Underlining supplied).

heart attacks.[8] The diagnosis was Heart Disease with posterior myocardial infarction and slight ventricular hypertrophy,[9] Class 11. Tr. 79-89, 90-91.

In September 1951, Mr. Meneses had another VA medical examination for rating purposes. His electrocardiogram when compared to the one in 1948 revealed stabilized residuals of a posterior wall myocardial infarct. The medical examiner noted that this was "Definitely an abnormal record."[10] Tr. 74. Cardiac area of dullness was slightly enlarged.[11] Tr. 26. Mr. Meneses complained of pain in the chest, easily tired, poor memory and palpitation.[12] And immediately after exercise he complained of slight dizziness and slight difficulty of breathing.[13] Tr. 26-27. The diagnosis was myocardial infarction posterior wall, Class 11. Tr. 26-27. A rating board of the Veterans' Administration in December 1951 thought the current VA special cardiac examination showed improvement in heart condition, "with slight

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8. Not referred to in hearing examiner's opinion.

9. Ventricular hypertrophy means enlargement of the ventricle chamber of the heart. "Cardiac enlargement of hypertrophy eventually occurs in at least two thirds of the cases of cardiac infarction." Friedberg, supra at p. 790.

10. Not referred to by hearing examiner.

11. Ibid.

12. Not referred to by hearing examiner.

13. Ibid.

dizziness and slight difficulty of breathing after exercise."[14] That report then made the following rating determinations: Tr. 71.

100% from 10-23-47 to 4-22-48
60% from 4-23-48 to 2-3-52
30% from 2-4-52

In September 1955, plaintiff had another VA examination. According to a VA rating sheet, the out patient treatment folder noted that plaintiff complained of pain in the precardial area every day. His heart was in the upper limits of normal in size, and had increased in size since his last examination in 1948. EKG revealed stabilized residuals of old posterior myocardial infarction.[15] Tr. 69. The medical examiner considered that plaintiff's functional capacity was class III, and noted that he should refrain from strenuous or continuous[16] physical activity but should be able to perform moderate activity; and VA increased his disability rating from 30% to 60%. Tr. 69.

In August, 1958, Plaintiff had another VA rating medical examination.[17] Tr. 58-67, 103. He complained of precardial pain, shortness of breath, cramps in both legs. The medical examiner noted that Mr. Meneses appeared weak and chronically sick. His heart sounds were strong but irregular. An exercise

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14. Quoted part not referred to by examiner.
15. 1955 examination partially referred to by examiner.
16. Not referred to by hearing examiner.
17. 1958 examination partially referred to by examiner.

tolerance test had to be abandoned because plaintiff was complaining of precardial pains, shortness of breath and dizziness. Tr. 58-61. He was found to have a posterior myocardial infarct and premature ventricular systole. Tr. 59. The diagnosis was, "Organic Heart disease, Coronary arteriosclerosis, myocardial damage, Posterior myocardial infarct, Anginal syndrome, Class 111."[17a] Tr. 61. He was rated as 100% disabled and a notation of "individual unemployability" made on his rating sheet. Tr. 58, 103.

From August 1960 until at least October 12, 1961, Mr. Meneses received out-patient treatment from the Medical Division of the Veterans' Administration.[18] Tr. 19.

Petitioner was also examined by the Veterans' Administration on March 22, 1962, on an out-patient basis.[19] The medical examiner thought he looked chronically ill. Tr. 21. His heart sounds were fairly strong with occasional extra systole. The EKG showed a faster rate when compared with tracings made July 20, 1961. There was evidence of an old posterior wall myocardial infarct. The diagnosis was "Arteriosclerotic heart disease, compensating." The medical examiner thought "easy fatigability--improved, but precardial pains persisted."

17a. According to the American Medical Association Guides, referred to by the hearing examiner and by the government, in a motion for Summary Judgment, Class 111 is regarded as a 50 to 70% impairment. Without resulting symptoms at rest, but "walking more than one or two blocks on the level, climbing one flight of ordinary stairs, or the performance of the usual activities of daily living produce symptoms." 172 AMAJ 1053.

18. Every two months according to plaintiff. Not referred to by examiner.

19. Not referred to by examiner.

Tr. 21-23.

According to an April 12, 1962 VA report,[20] referring to plaintiff's history, he liked to work but did not feel well when he worked. Every time he exerts effort he complains of shortness of breath and chest pains. When he walks about a hundred yards, he feels chest pain and shortness of breath. When there is pain and shortness of breath he rests. He did very little walking and had sleepless nights. When he exerts more effort, his condition becomes worse. He does a little brooming in the house but the rest of the housework is done by his wife and a house helper. When not feeling well he tries to have a short nap. The interviewer noted that Mr. Meneses appeared weak and was complaining of weakness and dizziness when working. Tr. 34-36.

According to a July 25, 1962, Veterans' Administration consultation sheet, Mr. Meneses had been complaining of recurrent mild substernal oppression since 1947, shortness of breath on walking long distances and left shoulder pains. His electrocardiogram was abnormal and his heart rhythm had frequent irregular beats.[21] Tr. 37-40.

A May 1965 VA report found that plaintiff's heart showed a hypertrophied configuration, suggestive of left ventricle hypertrophy. An electrocardiogram showed a posterior inferior myocardial infarction, old, and premature ventricular beats. Plaintiff was diagnosed as having coronary heart disease,

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20. This report does not appear to have been referred to by the examiner.

21. This report not referred to by the examiner who did not mention any of the 1962 reports in his opinion.

functional class II, therapeutic III. The report noted that his condition was not static and improvement was not expected. "By continued surveillance, prevention of recurrence is objective." It recommended no stressful work or manual labor. It found that ordinary activity resulted in dyspnea and angina.[22] It found the plaintiff was under continuous treatment.[23]

Mr. Meneses served in the United States Army as a Philippine scout, starting his army career after one year in high school, and was discharged with the rank of staff sergeant in 1947. Tr. 28, 35. He has completed either the eleventh or twelfth grade. Tr. 16, 34, 45. While in the service, he attended a Division Signal school for three months some time in 1932. Tr. 35. In 1951-52 he took a radio technician course for ten months. Tr. 35. In 1955, while an outpatient at a VA installation, he tried to pick strawberries but after two hours had to stop because of his heart condition. In October and November 1955, he worked at a noncommissioned Enlisted Men's Club in San Francisco as assistant bartender; with the permission of his employer he sat and rested when tired but still had to leave because of his heart condition. Tr. 33-34.

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22. There is a passing reference to this report by the examiner.
"Angina pectoris is a clinical syndrome characterized by paroxysmal attacks of a distinctive pain or oppression, usually situated retrosternally, radiating commonly to the precordium and left upper extremities and occasionally to other adjacent areas, precipitated by effort or emotion and often also by other factors, and relieved rapidly by rest or nitrates." Friedberg, supra n. 5, at p. 706.

23. Not referred to by examiner.

In service and out of service he has been treated with medicines by mouth and by injection. Tr. 34.

Mr. Meneses could read, write and speak English. Comprehension and adequacy of responses to questions were fair. Tr. 35.

ARGUMENT

The Court may shudder at the number of cases cited in this brief, but it is our position that there are well established guiding rules of law in cases of this sort which were ignored by the defendant and the District Court, that while the facts in the cases cited are not zerox copies of the facts in this case, their range and, in many instances, their closeness, are, we think, persuasive analogies. Moreover, for some reason, while opinions in Social Security disability cases abound in many jurisdictions there are few such in this jurisdiction to serve as precedents for this Court.

It is the plaintiff's contention that the denial by the Secretary of disability benefits under either of the statutory tests is not supported by substantial evidence, that the record shows clearly that plaintiff is entitled to disability benefits under both tests, and, alternatively, that gaps in the evidence and the unfairness of the hearing afforded plaintiff furnishes good cause for remand to the Secretary for further proceedings.

It is plaintiff's further contention that there were many errors of law committed in the proceeding and that these

require a holding for plaintiff or alternative remand.

I. THE APPLICABLE STATUTORY LAW IS EMBODIED IN 42 U.S.C. 405(g), 423(d), AND THE REGULATIONS OF THE DEPARTMENT OF HEALTH, EDUCATION and WELFARE

Prior to September 1965 the applicable statutory definition of disability was,

> inability to engage in any substantial gainful activity by reason of any medical determinable physical or mental impairment which can be expected to result in death or to be of long continued and of indefinite duration. 42 U.S.C. 423(d).

The Social Security Act amendments of 1965 amended the definition of disability to provide that the applicant must have been under a disability which can be expected to result in death or which has lasted or could be expected to last for a continuous period of not less than 12 months. The hearing examiner purported to have applied both tests. Tr. 10. Plaintiff brought his action pursuant to the authorizing provisions of 42 U.S.C. 405(g). We shall refer to applicable regulations of the Department of Health, Education and Welfare, elsewhere.

II. THE DENIAL OF PLAINTIFF'S APPLICATION FOR DISABILITY BENEFITS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT WAS ERROR TO DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(WITH REFERENCE TO THIS POINT, APPELLANT DESIRES THE COURT TO READ THE HEARING EXAMINER'S TRANSCRIPT)

A. <u>It was Reversible Error to Ignore Applicable Principles of Law</u>

A number of clear principles of law, applicable to the instant case, have been established out of the numerous

disability cases which have had judicial scrutiny. In cases of this sort a set of facts is not to be treated in isolation as if there were no body of relevant law to help determine whether they come within the terms of the Social Security statute. It is our contention that both the defendant and the District Court failed to apply such relevant principles of law.

We submit that this fatal omission becomes apparent when the hearing examiner's opinion is looked at in the light of such legal principles. The District Court, in its brief adoption of the government's proposed judgment finding there was substantial evidence to support the hearing examiner suggests a like ignoring of such legal principles.[24]

At this point we refer to a number of such principles of law. In the course of our argument we shall expand upon some of them and refer to still some other governing principles.

B. The Disability Statute Should Be Liberally Construed

The statute is to be liberally construed since it is a statute aimed at affording relief to disabled workers within the coverage of the statute. Davidson v. Gardner, 370 F. 2d 803(6th Cir. 1967); Berven v. Gardner, 414 F. 2d 857(8th Cir.

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24. Thus, when counsel for plaintiff in the argument before the District Court tried to point out that a number of the cases cited in his memorandum had held that where there was a medical impairment which prevented the applicant from returning to his prior work the defendant had the burden of showing availability of opportunities for substantial gainful employment, the Court observed that he did not see why he should look at other cases than the one before him.

(4); Kelly v. Flemming, 183 F. Supp. 450 (W.D. Ark. 1960); Allison v. Celebrezze, 238 F. Supp. 667 (W.D.S. Car. 1964); Gracia v. Secretary of Health, Education and Welfare, 248 F. Supp. 522 (D. Puerto Rico 1966).

C. In Cases of This Sort a Careful Review of The Record Is Called For

The defendant, absent other factors such as errors of law, is entitled to an affirmance if there is substantial evidence to support his denial, but the Court is not a rubber stamp and will carefully review the record to see whether there is the requisite "substantial evidence."[24] Allison v. Celebrezze, 238 F. Supp. 667 (W.D.S. Car. 1964); Popovich v. Celebrezze, 220 F. Supp. 205(W.D. PA. 1963). It has been noted that the great number of errors and reversals in Social Security disability cases constitutes a warning signal for careful review. Sayers v. Gardner, 380 F. 2d 940 (6th Cir. 1968).

To the same effect, Farley v. Celebreezze, 315 F. 2d 704 (3d Cir. 1963); Bridges v. Garner, 368 F. 2d 86(5th Cir. 1966).

Since the statute deals with future probabilities, post period evidence is relevant to evaluate such probabilities. Carnerval v. Gardner, 393 F. 2d 889 (2d Cir. 1968); Moore v. Finch, 418 F. 2d 1224(4th Cir. 1969).

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25. Where the record, as in this case, is confined to documentary evidence, an even closer scrutiny by both the District Court and this Court is called for, and while the hearing examiner's opinion is not to be disregarded its weight, properly, may be less than where he had heard and observed witnesses. Muller v. Gardner, 256 F. Supp. 588 (E.D.N.Y. 1966); Orvis v. Higgins, 180 F. 2d 537 (2d Cir. 1950), cert. den. 340 U.S. 810(1950): Dollar v. Land, 184 F. 2d 245 (D.C. Cir. 1950). In the case of an appellate court this is all the more so when it does not have the benefit of a reasoned opinion by the lower court.

D. The Hearing Examiner May Not Base His Decision on One Part of the Evidence While Ignoring the Rest of the Evidence

(With Respect to this Point, Appellant Desires the Court to Compare Her Statement of the Record Facts With the Opinion of the Hearing Examiner)

In our statement of facts we have pointed out that in at least seventeen respects the hearing examiner ignored or misstated evidence in the record which supported the Appellant's position. Unfortunately, such misuse of the administrative process has not been unique. In reversing such erroneous decisions the Court has held that the hearing examiner may not base his decision on one part of the evidence while ignoring the rest of the evidence. Colwell v. Gardner, 386 F. 2d 56 (6th Cir. 1967); Popovich v. Celebrezze, supra; Tinsley v. Finch, 300 F. Supp. 247 (D.S.Car. 1964).

We think it important to note, moreover, that in this case the examiner appears consistently to have made all inferences against plaintiff even in instances where inferences favorable to plaintiff were more or less equally logical. And this was so even though the evidence was wholly documentary. In so doing, as shall be shown, the hearing examiner not only made some egregious errors, but also failed to keep in mind the principle of law favoring a liberal construction of the Social Security Act. Seldomridge v. Celebrezze, 238 F. Supp. 610(E.D. Pa. 1964), and see cases cited supra fph 14-15

In considering whether a denial of Social Security benefits was supported by substantial evidence the courts have taken cognizance of such "unfairness", since the "weighing and interpretation of evidence must be reasonable." Bates v. Celebrezze, 234 F. Supp. 349, 354(W.D. S.Car. 1964); Smith v. Cele-

brezze, 239 F. Supp. 337(W.D. S.Car. 1965); Lee v. Gardner, 267 F. Supp. 578 (W.D. Mo. 1967).

Moreover, as adduced in our Statement of Facts, supra, the examiner ignored a great deal of evidence which was inconsistent with the result he reached. As to his error in this respect, see Smith v. Celebrezze, 239 F. Supp. 337 (W.D. S.Car. 1965), and supra, p. 16.

E. Failure of Defendant to Make Any Showing of Available Substantial Gainful Work Opportunities for the Applicant Compels Reversal of the Decision Below

(With Respect to This Point Plaintiff Desires the Court to Read the Transcript of the Record or to Read the Statement of Facts by Each of the Parties)

It is not in dispute, we believe, that Mr. Meneses had a medical impairment since 1947, which prevented him from returning to the army.[26]

In the instant case the defendant made no attempt to show that substantial gainful work opportunities for one in the applicant's condition and with his absence of work experience were available. Such omission, we submit, is fatal to defendant's position.

Once the applicant has shown that he has an appreciable physical or mental impairment which prevents him from doing the type of work he had been doing, the Secretary has the burden to show that substantial gainful work is available to one in applicant's condition. And, it is not enough to show a mere theoretical ability to engage in substantial gainful activity. It must be shown that there is a reasonable

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26. Cf. Bethune v. Finch, 302 F. Supp. 425, 434-35: "Medical authorities are generally in agreement that enlargement of the heart constitutes a medically determinable impairment."

opportunity to engage in substantial gainful activity. Hall v. Celebrezze, 314 F. 2d 686 (6th Cir. 1963); Ber v. Celebrezze 332 F. 2d 293 (2d Cir. 1964); Ratliff v. Celebrezze, 338 F. 2d 978 (6th Cir. 1964); Thompson v. Celebrezze, 334 F. 2d 412 (6th Cir. 1964); Massey v. Celebrezze, 345 F. 2d 146 (6th Cir. 1965); Davidson v. Gardner, 370 F. 2d, 803, 823 (6th Cir. 1966); Gardner v. Stewart, 361 F. 2d 827 (4th Cir. 1966); Baker v. Gardner, 362 F. 2d 864 (3d Cir. 1966); Bridges v. Gardner, 368 F. 2d 86 (5th Cir. 1966); Kirby v. Gardner, 369 F. 2d 302 (10th Cir. 1966); Gardner v. Brian, 369 F. 2d 443 (10th Cir. 1966); Boyd v. Gardner, 377 F. 2d 718 (4th Cir. 1967); Rosin v. Secretary of Health, Education and Welfare, 379 F. 2d 189 (9th Cir. 1967); Goodwin v. Celebrezze, 239 F. Supp. 487, 489 (W.D. La. 1965); Knelly v. Celebrezze, 249 F. Supp. 521 (W.D. Pa. 1966); Bobak v. Finch, 304 F. Supp. 976 (W.D. Pa. 1969); Weaver v. Finch, 306 F. Supp. 1185 (W.D. Mo. 1969); Jones v. Cohen, 295 F. Supp. 1303 (W.D. Pa. 1969); Cancel v. Gardner, 268 F. Supp. 206 (D. Puerto Rico 1967); Bethune v. Finch, 3027 F. Supp. 425 (W.D. Mo. 1969).

It is undisputed that plaintiff had no work history except as a soldier in the army. It is undisputed that he had a serious heart ailment and that slight exertion caused disabling symptoms. Respondent proferred no evidence to show that substantial gainful employment was available to one in petitioner's condition. It is clear that there is no substantial evidence of the availability of substantial gainful employment.

1. Irregular and Sporadic Work of Short Duration Are Not Substantial Gainful Employment

The examiner stated that it was his decision "that although the claimant has shown that he has been physically impaired since 1947, he has not established that he has been continuously unable since before September 30, 1950 to engage in substantial gainful work because of impairments of long-continued and indefinite duration." Tr. 10 (underlining supplied). We submit that neither the relevant statutes nor the decisions of the courts require continuous inability. Under such a test an applicant would have to show that at no time over a long period of time could he have performed any substantial gainful employment. "The fact that there are days when plaintiff could work does not mean that the opportunity to do so is realistically available to him." Spivak v. Gardner, 268 F. Supp. 366, 372 (E.D. N.Y. 1966). Acc. Walker v. Gardner, 266 F. Supp. 998 (S.D. Ind. 1967).

The examiner refers to a short period of employment of petitioner in 1955 and asserts insupport of his denial that petitioner was able to perform the usual activities of daily living without discomfort. Tr. 9. We shall have more to say, shortly, about this 1955 work incident. Here, however, we point out that not only is the examiner's statement inaccurate and not supported by the record; Tr. 26, 34, 35; and see plaintiff's Statement of Facts; but time and again the Courts have pointed out that an applicant for disability benefits is not to be barred because of temporary ability to do work. Thus it has been said, "Substantial gainful activity

means performance of substantial services with reasonable regularity in some competitive employment. . .It means a quantity of fairly constant physical, mental or mixed physical and mental service productive of value or benefit." Edwards v. Celebrezze, 220 F. Supp. 79, 85(W.D. S.Car. 1963); and gainful activity must have continuity. Randall v. Flemming, 192 F. Supp. 111 (W.D. Mich. 1961). And see Berven v. Gardner, 414 F. 2d 857 (8th Cir. 1969} Austin v. Celebrezze, 230 F. Supp. 256 (S.D. Texas 1964); Corn v. Flemming, 184 F. Supp. 490 (S.D. Fla. 1960); Peck v. Ribicoff, 193 F. Supp. 450 (E.D. Va. 1961); Coyle v. Gardner, 298 F. Supp. 609 (D. Hawaii 1969).

It has been noted that, "employers are concerned with substantial capacity, psychological stability, and attendance; they will not unduly risk increasing their health and risk insurance." Thomas v. Celebrezze, 331 F. 2d 541, 546 (4th Cir. 1964). And "the general statement of a physician that a claimant could perform 'light work' is not substantial evidence that he is able to engage in substantial gainful employment." Davidson v. Gardner, 370 F. 2d 803, 821 (6th Cir. 1967). This is all the more so when such assertion comes from a hearing examiner since the test is not whether one is able to do an occasional light task or get through a day without discomfort but whether one's disability prevents one from substantial gainful employment. Berven v. Gardner, 414 F. 2d 857 (8th Cir. 1964); Teeter v. Flemming, 270 F. 2d 871 (7th Cir. 1959); Sobel v. Flemming, 178 F. Supp. 891

(E.D. Pa. 1959); Sebby v. Flemming, 183 F. Supp. 450 (W.D. Ark. 1960); Pruitt v. Flemming, 182 F. Supp. 159 (S.D. W.Va. 1960); Lippert v. Ribicoff, 215 F. Supp. 28 (N.D. Calif. 1963); Edwards v. Celebrezze, 220 F. Supp. 79 (W.D. S.Car. 1963); Cummins v. Celebrezze, 222 F. Supp. 285(W.D. Ark. 1963); Mims v. Celebrezze, 217 F. Supp. 581 (D. Colo. 1963); Hamlet v. Celebrezze, 238 F. Supp. 676 (E.D. S.Car. 1965); Davis v. Celebrezze, 233 F. Supp. 292 (E.D. S.Car. 1964); Amick v. Celebrezze, 253 F. Supp. 192 (D.S. Car. 1966); Webb v. Celebrezze, 226 F. Supp. 394 (D. Mont. 1964); Gilbert v. Gardner, 254 F. Supp. 124 (D. Mont. 1966); Hammondsv. Celebrezze, 260 F. Supp. 992 (N.D. Ala. 1965); Joki v. Flemming, 189 F. Supp. 65 (8th Cir. 1960).

The reference by the examiner in support of his decision that an alleged presumptive ability to work as a radio technician is purely theoretical and unfounded. The examiner asserted that presumably petitioner could have performed the task of radio technician, "since it is common knowledge that this is light work performed at a bench where one works seated. It does not involve heavy lifting or strenuous exertion." Tr. 9. This assertion is not only not supported by substantial evidence;[27] it is not supported by any evidence. Moreover it is an irrevelance since there is no evidence of the availability of such jobs to one in plaintiff's condition in the area where plaintiff lived or elsewhere.

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27. A call by court appointed attorney to a local radio school evoked the comment that the job of radio technician involved more than light work sitting at a bench.

In the same vein, the examiner stated the petitioner's application revealed the latter had been enrolled as a radio technician, from June 1951 to March 1952, had a high school education, and had been rated a staff sergeant when he left military service. From this he concluded that, "It is apparent that both by education and experience he was capable of performing light activity until 1951." Tr. 9.

This is almost a classic non-sequitur, namely that all persons enrolled in a radio technician school[28] and all high school graduates are able to perform light activity, without regard to their work experience, physical or mental condition and work opportunities.

We have noted that this approach of the examiner is contrary to the teachings of the courts. See supra, p. 21. It is also contrary to the teachings of the regulations of the Social Security Administration. Thus, one regulation states, "Substantial gainful activity is work activity that is both substantial and gainful." 20 CFR 404:1502H. Another regulation provides: "'Made work', that is work involving minimal or trifling duties which make little or no demand on an individual and are of little or no utility to his employer, or to the operation of a business, if self employed does not demonstrate ability to engage in substantial gainful activities."[29]

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28. There is nothing in the record to indicate that the petitioner finished a radio technician's course. In fact, it appears that he was exempted from one course, did more poorly in his second semester than in his first, and failed in one course. Tr. 104, and see Tr. 4.

29. 20 CFR 404:1532(c). Another regulation provides: "Where the individual establishes that the time devoted to his trade or business during a calendar month was not more than 45 hours, the individual's services in that month are not considered substantial unless other factors... make such finding unreasonable." 20 CFR 404:446.

2. The Hearing Examiner's Reference to 1955 "Work" by the Applicant was Egregious Error

The trial examiner's statement, which appears in his opinion as a ground for his decision, that in 1955 petitioner "was feeling so good" he returned to work as bartender, Tr. 9, shows an attitude clearly inconsistent with applicable principles of law. There is no evidence to support "was feeling so good." The examiner, moreover, omitted the uncontradicted qualification that the petitioner had to quit this job, as an assistant bartender at a Non-Commissioned Men's Club in San Francisco, after a short time because of his ailment and that he had to quit another very short time job for the same reason. Tr. 31.

Since plaintiff was in San Francisco at that time for outpatient treatment at a Veteran Administration hospital, it seems a logical conclusion that his attempts to work at that time were the result of a great need of funds for such a trip.[30]

Instead of giving plaintiff credit for not being a malingerer the examiner used Plaintiff's unsuccessful attempts to work as a ground for denying plaintiff relief. This is clear error, and those incidents are substantial evidence that plaintiff's disability was such as to preclude substantial gainful employment. Mann v. Flemming, 189 F. Supp. 587, 588 (E.D. Ark. 1960); Wiley v. Celebrezze, 244 F. Supp. 504 (W.D. Mich. 1965); Gilliam v. Gardner, 284 F. Supp. 529 (D. S.Car. 1968); Coyle v. Gardner, 298 F. Supp. 609 (D. Hawaii 1969).

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30. He was given $7.00 a week aid by The International Institution in San Francisco. He was given $5.00 twice by the DAV Organization. Tr. 33. It may be doubted that even in 1955, $30.00 a week (his salary as assistant bartender) would in San Francisco or elsewhere be considered substantial gainful activity.

Here again, the examiner flouted the regulations of his own agency.

20 CFR 404:1532 (c) "Adequacy of performance."

> "The adequacy of an individual's performance of assigned work is also evidence as to whether or not he has ability to engage in substantial gainful activity. The satisfactory performance of assignments may demonstrate ability to engage in substantial gainful activity, while an individual's failure because of his impairment to perform ordinary or simple tasks satisfactorily without supervision or assistance beyond that usually given other individuals performing similar work, may constitute evidence of inability to engage in substqntial gainful activity."

Another regulation is also relevant: "Where an individual is forced to discontinue his work activities after a short time because his impairment precludes continuing such activities, his earnings would not demonstrate ability to engage in substantial gainful activity." 20 CFR 404:1534.

3. The Hearing Examiner's Reference to the Size of Applicant's Family as Evidence of Non-Disability was Prejudicial Error

The examiner's statement in support of his decision that plaintiff, during 1951-58 found it within his means and capacity to acquire a family of seven children (Tr. 9) is an extraordinary tour de force. Aside from the fact that the examiner's statement as to number of children may be incorrect,[31] his statement and conclusion are neither supported by substantial evidence nor relevant. It may be noted that by the time of petitioner's second application two of his children were over 18, another was about 17; and if one wishes to

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31. According to two references in the record petitioner appears to have had five children, only one of whom was born after 1951. Tr. 17, 46. According to another reference he had seven children. Tr. 35. A disregarded VA file see infra 38 indicates some of the children may have been adopted.

speculate, they and his wife may well have helped support the family.[32]

It may be observed that the Social Security Act is neither designed to, nor authorizes the examiner to enforce birth control. See Pollard v. Gardner, 267 F. Supp. 890, 907 (W.D. Mo. 1967); Mullins v. Cohen, 296 F. Supp. 181 (W.D. Va. 1969).

F. Applicant Was Entitled to Disability Benefits Because for a Period of at Least 12 Months He Was or Could Be Expected to be Continuously Disabled from Substantial Gainful Activity

Since the record shows that from 1947 on the plaintiff has suffered from his impairment, a heart ailment, there can be no doubt that his "disability" has been long continued and of indefinite duration. See Statement of Facts, supra. And if such impairment amounted to disability under that test, the 1965 test of "at least 12 months" is also met.

As to the 12 month test, however, there are special facts which are highly significant. Plaintiff was hospitalized from May 20, 1947 until October 1947 because of a serious heart attack, and of course, during such period he was disabled from any substantial gainful activity.[33] And until April 22, 1948, Veteran's Administration rated him as 100% disabled; while from April 23, 1948 to February 3, 1952 he was rated as 60% disabled. Thus during a relevant 12 months period he was rated 100% disabled for 11 months and 60% dis-

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32. The petitioner was also getting a pension from VA.

33. Compare Title 20 CFR 404:1502(f): "An individual with a disabling impairment which is amenable to treatment that could be expected to restore his ability to work would be deemed to be under a disability if he is undergoing therapy prescribed by his treatment but his impairment has nevertheless continued to be disabling or can be expected to be disabling at least 12 months."

abled for another month.[34] Between the time of his discharge from the army and September 1948 he had had 4 heart attacks. Tr. 79. And there is, we submit, an utter lack of evidence of suitable substantial employment opportunities during such 12 month period, a period during which plaintiff suffered from precardial pains and fatigue upon slight exertion. Tr. 80. It would seem clear, therefore, that aside from other evidence, this is clear proof that for a period of at least 12 months plaintiff continuously was disabled from substantial gainful activity.

G. The Hearing Examiner's Conclusion as to Applicant's Heart Condition is Erroneous and Not Supported by Substantial Evidence

Disability cases under the Social Security Act cover a wide variety of ailments. While relevance to the instant case is not necessarily dependent upon the nature of the ailment, for the convenience of the Court and because of their factual relevance, we have here collected a number of disability heart ailment cases in which the courts have found the plaintiff entitled to disability benefits under the Act:

Underwood v. Ribicoff, 298 F. 2d 850 (4th Cir. 1962)
Celebrezze v. Walter, 346 F. 2d 156 (5th Cir. 1965)
Polly v. Gardner, 364 F. 2d 969 (6th Cir. 1966)
Wooten v. Celebrezze, 259 F. Supp. 685 (D. S.Car. 1966)
Sebby v. Fleming, 183 F. Supp. 450 (W.D. Ark. 1960)
Ellerman v. Fleming, 188 F. Supp. 521 (W.D. Mo. 1960)
Joki v. Fleming, 189 F. Supp. 365 (D. Mont. 1960)
Sparks v. Ribicoff, 197 F. Supp. 174 (W. Va. 1961)
Corbin v. Ribicoff, 204 F. Supp. 65 (W.D. S.Car. 1962)
Brown v. Celebrezze, 210 F. Supp. 692 (E.D. S.Car. 1962)
Lippert v. Ribicoff, 215 F. Supp. 28 (N.D. Calif. 1963)
Turner v. Ribicoff, 224 F. Supp. 285 (S.D. Ala. 1963)

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34. Tr. 71. Since the hearing examiner relied so heavily upon Veteran Administration reports respondent can hardly disavow them on this issue.

Clark v. Celebrezze, 226 F. Supp. 394 (D. Mont. 1964)
Bass v. Celebrezze, 238 F. Supp. 355 (E.D. S.Car. 1965)
Vanderpool v. Celebrezze, 240 F. Supp. 801 (D. Ore. 1965)
Hinson v. Celebrezze, 249 F. Supp. 232 (D. S.Car. 1966)
Clemochefsky v. Celebrezze, 222 F. Supp. 73 (M.D. Pa. 1963)
Bryant v. Celebrezze, 231 F. Supp. 524 (W.D. S.Car. 1964)
Delafo v. Gardner, 272 F. Supp. 44 (D. N.J. 1967)
Baltimore v. Gardner, 271 F. Supp. 273 (W.D. Va. 1967)
Huneycutt v. Gardner, 282 F. Supp. 405 (M.D. N.Car. 1968)
Bethune v. Finch, 302 F. Supp. 425 (W.D. Mo. 1969)
cf. McGaha v. Ribicoff, 262 F. Supp. 161 (D. Del. 1966);
Johnson v. Cohen, 293 F. Supp. 365 (W.D. Va. 1968)

The record facts in this case make many of the above cited cases closely analagous to the instant one.

The examiner asserted that several physicians rated petitioner's degree of impairment according to American Medical Association guidelines as Class II,[35] which is 20 to 40% impairment, and that according to these guidelines, "a class II organic heart is shown where organic heart disease exists but without resulting symptoms at rest. Walking freely on the level, climbing at least one flight of stairs, and the performance of the usual activities of daily living do not produce symptoms. Prolonged exertion, emotional stress, hurrying, hill climbing, recreation or similar activities produce symptoms." Tr. 9.

We assert that this reliance upon such guidelines is a striking misapplication of the law and the facts in many respects.

We submit that this reliance upon an artificial classification is contrary to the admonitions of the courts that the focus should be on the individual rather than on the

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35. The examiner does not mention that according to some medical reports he was thought to be in Class III. See supra, pp. 8,9.

average man. Page v. Celebrezze, 311 F. 2d. 757 (5th Cir. 1963); Jarvis v. Ribicoff, 312 F. 2d 707 (6th Cir. 1963); Wimmer v. Celebrezze, 355 F. 2d 289(4th Cir. 1966); Kirby v. Gardner, 369 F. 2d 302, 304 (10th Cir. 1966); Carlisle v. Ribicoff, 200 F. Supp. 662 (N.D. Ala. 1962); Wiley v. Celebrezze, 244 F. Supp. 504 (W.D. Mich. 1965). Furthermore, this overreliance upon a classification is in contrast to respondent's own recognition of the advisability of a different approach, an approach which is almost tailored to the instant case:

> While there are many causes of heart disease, severe loss of capacity is ordinarily caused by one of two principal symptoms of the disease, shortness of breath and pain. Consideration is given to the total evidence including significant and persistent symptoms referable to cardiac disease when the individual engages in mild exertion such as walking several blocks, using public transportation, or engaging in the ordinary activities of daily living. 20 CFR 404:1514

This approach is reiterated and amplified in at least two other regulations which were disregarded by the examiner. 20 CFR 404:1502 and 1514(c). It may be noted that the latter also states: "Electrocardiographic changes help in establishing diagnosis in terms of electrophysiological changes but tell very little about residual function."

The application of those regulations are apparent when we consider that plaintiff was fatigued upon short walks, suffered pain and dizziness. See supra pp. 7-11.

It is to be noted that a number of medical reports placed the applicant in a Class III category. See supra pp. 8-11.

And since the examiner and the government have tried to

into much of a Class II heart classification, it is well to note that on the basis of the medical ratings (only one less than 60%), and the symptoms we have just mentioned above, a Class III or higher rating would seem much more appropriate.[36]

Again, there is a total disregard of the accompanying qualification of "pain" with respect to this Class II rating. And the hearing examiner in his opinion omitted the following qualification specifically set out in the American Medical Association's Journal's exposition of the Class II rating:

> One of the problems in the evaluation of cardiovascular impairment is the frequent disparity between objective findings and subjective symptoms. For instance, a patient with coronary artery disease may appear completely normal on examination, including electrocardiogram and x-ray, yet he may be severely impaired by angina pectoris." Committee on Medical Rating of Physical Impairment--Guides to the Evaluation of Permanent Impairment--The Cardiovascular System, 172 AMAJ 1049, 1050(1960)

As to the element of pain, ignored by both the hearing examiner and by government in this suit, the evidence is uncontradicted that plaintiff was suffering from angina pectoris pain,[37] that plaintiff was in such pain often and over a long

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36. Even as to the functional classification II, it has been said as to those within that classification: "They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea or anginal pain." Criteria Committee of The New York Heart Association, Disease of The Heart and Blood Vessels (6th ed. 1964)11. And see remarks of the Court in Vanderpool v. Celebrezze, 240 F. Supp. 801 (D. Ore. 1965) with respect to American Heart Association Criteria.

37. "Angina Pectoris. The complaint of chest pain which is considered to be of cardiac origin, must be associated with abnormal laboratory findings...Angine pectoris, as used herein is considered to be substernal pain precipitated by effort and relieved by rest or nitro glycerin described crushing, squeezing, burning, pressing or equivalent thereof." 32 Fed. Reg. 11758, Aug. 20, 1968.

period of time, and that exertion brought on pain. Tr. 24-25, 80, 26, 69, 59, 61, 21, 34, 37, 52. That it is error for the hearing examiner to ignore the factor of pain and that pain may be considered a significant disabling factor has been held in a long line of cases. Page v. Celebrezze, 311 F. 2d 757 (5th Cir. 1963); Ber v. Celebrezze, 332 F. 2d 293 (2d Cir. 1965); Celebrezze v. Walter, 346 F. 2d 156 (5th Cir. 1965); Henninger v. Celebrezze, 349 F. 2d 808 (6th Cir. 1965); Miracle v. Celebrezze, 351 F. 2d 361 (6th Cir. 1965); Davidson v. Gardner, 370 F. 2d 803 (6th Cir. 1967); Combs v. Gardner, 382 F. 2d 949 (6th Cir. 1967); Wilson v. Ribicoff, 196 F. Supp. 579 (W.D. Pa. 1961); Park v. Celebrezze, 214 F. Supp. 153 (W.D. Ark. 1963), App. Dism. 321 F. 2d 543 (8th Cir. 1963); Drafts v. Celebrezze, 240 F. Supp. 535 (E.D. S.Car. 1965).

It was error to ignore negative evidence as to pain and fatigue. Moore v. Finch, 418 F. 2d 1224 (4th Cir. 1969).

The hearing examiner said that the claimant had shown symptoms of organic heart disease since 1947, but as late as 1965, he was still without resulting symptoms at rest. Tr. 9. At any rate, if this were so it would be an irrelevancy since under the applicable statutes the concern is with the applicant's situation and condition if engaged in substantial gainful activity, not with his condition at rest.

The hearing examiner and the government assert that the plaintiff's condition had become stabilized by 1951. A review of our Statement of Facts shows that this simply is not so. See supra, 8-11.

The 1951 report considered plaintiff's heart condition to

be better than when rated in 1948,[38] but that report acknowledged that plaintiff had slight difficulty breathing after exercise, was complaining of pain in the chest, easily tired, poor memory and palpitation. Tr. 71. And the electrocardiogram report stated: "Definitely an abnormal record." Tr. 74. That kind of "stabilized condition"[39] is hardly one to make its holder a likely candidate for substantial gainful activity.

The examiner and the government refer to a 1955 report which stated that plaintiff should be able to perform moderate activity. This is the only medical report which makes any such assertion. But this report not only placed plaintiff in a Class III category, but also stated that he "should refrain from strenuous or continuous physical activity." (Underlining supplied Tr. 69. It would seem clear that a restriction on continuous physical activity would place substantial gainful activity out of plaintiff's reach.

We submit that on the facts and on the law petitioner's heart ailment was disabling within the meaning of the Social Security Act. See particularly cases cited supra, 26-27.

We respectfully submit that the decision of the defendant and the District Court should be reversed because there is not substantial evidence to support such decisions, and there is substantial evidence to support the granting of disability

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38. That report may, perhaps, have been colored by the fact that a redetermination of plaintiff's enlistment periods required payment by Veteran's Administration for a number of back years. Tr. 70.

39. Compare, "Furthermore, it must be recognized that the degree of permanent cardiovascular impairment is not static." 172AMAJ1050

benefits to petitioner.

II. IF A DECISION ON THE MERITS IS NOT GIVEN FOR PETITIONER, THE CASE SHOULD BE REMANDED TO THE SECRETARY FOR FURTHER PROCEEDINGS

The revelant statute, 42 U.S.C. 405(g), expressly authorizes the District Court to remand for good cause shown. It is not, moreover, a comfortable fact for the observer to note that the Courts have often found good cause in the unfairness of a particular Social Security proceeding. And the instant case is a horrible example of administrative unfairness.

a. Failure to Afford Petitioner a Reasonable Opportunity for an Oral Hearing

The hearing procedure established under the regulations of the defendant are very much geared to an oral hearing. 20 CFR 404: 917, 918, 925, 926, 929, 934. So strong is this recognition of the value of oral hearings in Social Security disability cases[40] that the regulation providing for waiver of an oral hearing contains the following provisions: "If all parties waive their right to appear before the hearing

40. In the 1966 U.S. Dept. of Health, Education and Welfare annual report appears the following statement, at p. 24: "In disability cases additional emphasis was placed on the use of vocational and medical expert witnesses. Procedures were also adopted to pay claimant's travel expenses when it was desirable for them to travel more than 75 miles to a hearing. This is more economical than sending doctors, medical advisors, and vocational consultants (concerned with a claimant's hearing) to the claimant's area for a hearing."
A Social Security pamphlet procured by court appointed attorney entitled "Right To Question The Decision Made On Your Claim" issued in February 1968, states:"A hearing is usually held in the city where the social security office that handles your claim is located so that you may conveniently attend the hearing and present your case in person." At the hearing, the hearing examiner reviews

examiner and present evidence and contentions personally or by representative, it shall not be necessary for the hearing examiner to give notice of and conduct an oral hearing... Even though all of the parties have filed a waiver of the right to appear and present evidence and contentions at a hearing before the hearing examiner, the hearing examiner may, nevertheless, give notice of a time and place and conduct a hearing as provided in 404:923 to 404:933." 20 CFR 404:984.

Court appointed attorney has been informed that there are about 60 Social Security regional hearing examiners, and that over the last 5 years in more than 89% of the hearing examiner cases an oral hearing has been had.[41] These regulations and the practice of the agency attest to the importance attached to oral hearings in such proceedings.

The opportunity to be heard before a hearing examiner, to answer questions, and to explain, comment upon or contradict the written or oral testimony of others is an important right. And a number of courts have enumerated four tests to be used in evaluating this type of case. One of those enumerated tests has been subjective evidence of pain and disability testified to by the witness and confirmed by the

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40.(Con'd.) what has gone before in the case, states exactly what issues must be decided, and asks questions of you and your witnesses present. All testimony is taken under oath. You and your representative may question the witnesses, present new evidence, and may examine the evidence on which the hearing examiner will base his decision.

41. Information obtained from Mr. Duncan of Management and Planning Section of Bureau of Hearing and Appeals in 1969. Under 42 U.S.C. 405(g) for remand purposes the Court may consider extraneous matter. Sweeny v. Gardner, 277 F. Supp. 622 (D. Mass. 1967).

testimony of others. E.g. Underwood v. Ribicoff, 298 F. 2d 850 (4th Cir. 1962); Gilliam v. Gardner, 284 F. Supp. 529 (D. S.Car. 1968); Pendergraph v. Celebrezze, 255 F. Supp. 313 (M.D. N.Car. 1966). Moreover, a reading of a number of social security disability cases leaves one with a firm impression of the value of oral testimony in such cases. E.g. Gilliam v. Gardner, supra; Staskel v. Gardner, 274 F. Supp. 861 (E.D. Pa. 1967).

The hearing examiner in his opinion states that the claimant waived his right to appear and testify. And it is true that on the printed Request For Hearing form the box opposite which appeared: "I waive my right to appear and give evidence before the hearing examiner" was checked for the applicant by a representative of the Disabled American Veterans, Tr. 11, but earlier that year the petitioner had been advised by the respondent that no provision had been made for a hearing outside the United States and that he had the choice of coming to the United States at his own expense or have the hearing examiner decide on the basis of written evidence. Tr. 98.

We submit that this kind of a choice was not one upon which a "waiver" may be found. To tell a Philippine resident of slender means and in ill health that he could go to the United States at his own expense was to give him no choice. In a less onerous situation it was noted that, "An added factor of unfairness in this case is the fact that the hearing was held some 700 miles away from the residence of this respondent. The round trip to Washington by plane would have

cost Green $00.20, and by bus $47.00 and over eighteen hours in travel time each way. Clearly an impoverished respondent who cannot afford a lawyer cannot be realistically expected to travel to Washington to represent himself no matter how many times that opportunity is offered him." In the Matter of American Chinchilla Corporation, FTC Opinion of Dec. 23, 1969, Dock. No. 8774. All the more so in the instant case, since in 1965 a round trip economy fare on the Pan American from Manila to Washington would have cost $1112.00.

Surely the respondent had the means to give the claimant an opportunity to testify and to have others testify in the Philippines. There is a close liason between the Social Security Administration and Veteran's Administration. There is a Veteran's Administration office in Manila, Philippines, which is used by the respondent. 20 CFR 404:701,946. And some use of that office was made in this case. Tr. 15,41. Social Security Administration has a contact representative who works out of the VA Manila office. Veteran's Administration has hearings under its own statute and such hearings for Philippine residents are held in the Philippines. The Contact Representative for Veteran's Administration in Washington, D.C. has assured Petitioner's court appointed attorney the Veteran's Administration, at respondent's request, could have provided for a hearing or taking of testimony of claimant in the Philippines. Also, it would seem that oral testimony could have been taken by arrangement with representatives of the State Department in the Philippines or even under Philippine law.

We submit that having the means the respondent had a duty

opportunity for oral testimony by petitioner in the Philippines. As has been well said, "The hearing examiner, however, has a greater duty to attempt to adduce testimonial evidence from the plaintiff and his witnesses which would reveal all the facts whether in aupport of his claim or against it, when a claimant is not represented by counsel." Hodges v. Celebrezze, 232 F. Supp. 419, 427 (W.D. Ark. 1964); acc. Staskel v. Gardner, 274 F. Supp. 861 (E.D. Pa. 1967); Hennig v. Gardner, 276 F. Supp. 622 (N.D. Texas 1967). And see Dabravalskie v. Gardner, 281 F. Supp. 919 (

(E.D. Pa. 1968; Coyle v. Gardner, 298 F. Supp. 608 (D. Hawaii We submit, the applicant was entitled to an oral hearing. Goldberg v. Kelly, Sup. Ct. No. 62, decided March 23, 1970; Wheeler v. Montgomery, Sup. Ct. No. 14, decided Mar.23,1970.

b. Failure to Provide Legal Services was Error

The respondent's restrictions on attorney's fees has resulted in few instances of attorney participation in disability administrative proceedings. Yet, we have a complex statute with a host of judicial and administrative interpretations, many administrative regulations, and, in fact, a judicial proceeding.[42] Courts have noted that because ordinarily in social security cases there is an absence of legal representation analogies between appellants in social security

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42. It may be noted that the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association scheduled for May 19, 1969, a whole day "Course of Study designed to Explain to the General Practitioner How to Try a Social Security Case." In a circular sent out by the committee it was said: "The increasing complexity of the statutory requirements has made the need for legal representation of Social Security claimants more apparent, particularly in those cases which, after initial denial and reconsideration, go to de novo hearings before independent hearing examiners whose decisions are final, subject to a review of the record by an Appeals Council and by Federal Courts."

cases with those before other administrative agencies "are thus a trifle strained." Farley v. Celebrezze, 315 F. 2d 704, 706 (3d Cir. 1963).

In reading the cases, time and again one sees the great difference in the kind of case presented for the claimant when he is represented by an attorney and where he is not so represented. E.g. Scales v. Fleming, 183 F. Supp. 710 (1959); Pendergraph v. Celebrezze, 255 F. Supp. 313 (M.D. N.Car. 1966). And more than one court has observed that the claimant's interests have not been protected by the hearing examiner.

While no case has been found where the Court has held an attorney must be made available to the claimant, Cf. Randolph v. United States, 274 F. Supp. 200 (M.D. C 1967), aff'd, 389 U.S. 570 (1968), a number of cases look that way. Arms v. Gardner, 353 F. 2d 197 (6th Cir. 1965) where the Court held that inadequate legal representation required a remand. Nichols v. Celebrezze, 243 F. Supp. 921 (S.D. Ia. 1965); Staskel v. Gardner, supra. As to the emphasis on legal assistance in criminal cases, see Gideon v. Wainwright, 372 U.S. 335 (1963); Arsenault v. Commonwealth, 395 U.S. 5 (1968). In In the Matter of American Chinchilla Corporation, Docket No. 8774, the Federal Trade Commission, in an opinion of December 23, 1970, held that a party unable to afford legal representation in an administrative proceeding was entitled to have counsel provided for him.

The government may say that petitioner had assistance. But the assistance of a representative of a veteran's organization

was palpably inadequate, mistaking the basis of rejection at one time, Tr. 55, 94 and apparently, helping petitioner to fill in certain forms. An attorney, it is believed, would have reviewed the whole Veteran's Administration file on petitioner and insisted upon an opportunity for oral testimony. Under these circumstances--an applicant in a distant land, ill and of little means--the respondent, we submit, had an obligation to make legal services available to petitioner.

c. Use of Material by Hearing Examiner, Not In Evidence, Was Error

Another important element of unfairness on the part of the hearing examiner was his use of a medical article which was not offered in evidence, was not brought to the attention of the claimant and which he had no opportunity to explain or rebut. We refer to the Examiner's reference to American Medical Association guides which appeared in one of its journals, with reference to a Class II heart impairment. How unfair this was we believe we have demonstrated by showing how misleading this reference was. See supra 27-29.

Such extra record references have been held improper. Colwell v. Gardner, 386 F. 2d 56 (6th Cir. 1967); Nems v. Gardner, 386 F. 2d 971 (6th Cir. 1967); Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D. Mo. 1962); Sosna v. Celebrezze, 234 F. Supp. 289 (E.D. Pa. 1964). Cf. Dabravalskie v. Gardner, 281 F. Supp. 919 (E.D. Pa. 1968).

d. Death of Applicant Was Not Considered by Defendant

According to the applicant's VA file, he died of a heart attack in August 1968. Since the defendant's denial of his application took place before then this fact was not considered

by defendant. It will be noted that the applicable statute, see supra p. 13, makes a medical impairment likely to result in death a test for disability under the Act. After learning of this fact of death, court appointed attorney discussed this matter with the chief Hearing Examiner in Washington and was advised by him that the applicant's death for such cause might be the basis of a disability claim. This, of course, would be in the nature of new evidence.

e. Failure of Examiner to Review Veteran Administration Files Was Error

Aside from a few items from petitioner, the examiner relied upon Veteran's Administration records. But here again he seems to have been lamentably remiss. Petitioner had authorized the use of VA files, Tr. 11, but respondent appears to have made its own arbitrary selection or relied upon a selection made by someone in Veteran's Administration.

In February, 1969, petitioner's court appointed attorney asked Veteran's Administration for permission to look at their files on petitioner. On April 29 he was advised that the file had been procured from the Philippines and was available for review. It contains a number of probative items which were not part of the record before the examiner. These range from background information about petitioner to a letter from his own doctor as to his medical condition.[43]

It seems apparent that respondent did not engage in complete review of the claimant's Veteran's Administration file.

43. That file has been returned to the Philippines and can be procured again, if need be.

f. Failure to Show Reasonable Work Opportunities and Errors of Law

Failure of the respondent to show reasonable work opportunities in a case where the impairment itself does not compel a decision in the claimant's favor not only may justify a decision of reversal in plaintiff's favor, it may also be the basis of a remand. Hodgeson v. Celebrezze, 312 F. 2d 260 (3d Cir. 1963); Bujnovsky v. Celebrezze, 343 F. 2d 868 (3d Cir. 1965); Harrison v. Gardner, 369 F. 2d 172 (5th Cir. 1966); Sanders v. Celebrezze, 225 F. Supp. 836 (D. Minn. 1963); Wooley v. Gardner, 283 F. Supp. 576 (E.D. Pa. 1968).

This is also true where an error of law has taken place. Kerner v. Flemming, 283 F. 2d 916 (2d Cir. 1960); Moncrief v. Gardner, 357 F. 2d 651 (5th Cir. 1966); Hanes v. Celebrezze, 337 F. 2d 209 (4th Cir. 1964); Carnerale v. Gardner, 393 F. 2d 889 (2nd Cir. 1968); Meola v. Ribicoff, 207 F. Supp. 658 (S.D. N.Y. 1962); Roberts v. Flemming, 187,F. Supp. 649 (W.D. Mo. 1960); Lopez v. Cohen, 295 F. Supp. 923 (S.D. Texas 1969).

III. A JUDGMENT SHOULD BE ENTERED DIRECTING RESPONDENT TO AWARD APPELLANT DISABILITY BENEFITS

It is submitted that the Court should direct a judgment in petitioner's favor if it agrees with his contentions.

It would be almost a mockery of justice if after all these years of pressing a claim for disability benefits, the strong case made out in the record of a disability impairment, the lack of substantial evidence to support respondent's denial, and the unfairness to petitioner in the proceedings had, the relief afforded was merely an invitation to try again, upon a

REPLY BRIEF FOR APPELLANT

PERFECTO MENESES

Appellant

v. No. 23,970

SECRETARY OF HEALTH, EDUCATION and WELFARE

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR APPELLANT

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DEPARTMENT OF HEALTH,EDUCATION
and WELFARE

TABLE OF CONTENTS:

TABLE OF CASES:

Philip Marcus
2020 Henderson Avenue
Wheaton, Md. 20902
Wh.2-3044

SERVICE ACKNOWLEDGED DATE: 8/18/70

BY: J. Wagner

FOR: THE U. S. ATTORNEY WASH. 1, D. C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERFECTO MENESES
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SECRETARY OF HEALTH, EDUCATION
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REPLY BRIEF FOR APPELLANT

FACTS:

Correction: On page 2 of appellant's brief the first full sentence should come at the end of the first full paragraph on page 2.

Government's Counter Statement Of Facts: Without impugning appellant's presentation of the facts, the Government, in its brief has a counter statement of facts. Highlighting a ground of appeal in this case is the shockingly inadequate-by omission and by misstatement- review of the facts in the decision of the hearing examiner; disturbingly inadequate, for the same reasons, is the Government's presentation of the facts to this Court.[1] Thus, at pages 2 and 8fn9 of its brief the Government deliberately attempts to give this Court the impression that appellant's initial heat attack was of a minor character, referrable to one day. As to the severity of that attack we respectfully refer the Court to page 5 of our brief.

In the Government's exposition of the 1951 medical examination(G.Br.3), it culpably omits the statement by the medical examiner:"Definitely an abnormal record", and that Mr. Meneses complained of pain in the chest, easily tired, poor memory and palpitations, and that immediately after exercise he complained of slight difficulty in breathing. See Agp. Br. 7. With reseect to a 1965 medical examination, the Government represents(G.Br.4),"There was no edema and dyspnea on ordinary activity(Tr.53)". The truth is that thattrecord reference shows that ordinary activity caused Mr. Meneses to have dyspnea and angina although not edema. The Government says(G.Br.5) that appellant did some work in 1955. We think

1. We note that the Government in specifying the pages of the transcript it wishes this Court to review on the question of substantiality omits even some of the pages on which it bases its counter statement. G. Br.5.

that fairness should have required it to add that he had to quit such work because of his condition. See App. Br. 11,23 for the full story of that incident.

In a reply brief we do not have space to enumerate all such incidents of deviousness on the part of the Government. There are more. We respectfully urge, therefore, that appellant's statement of facts be used by this Court not only to ascertain their totality but also as a basis of feference with respect to the argument of the parties.

2. Arguments of Government as to the facts

Appellee's efforts to have this Court disregard-as did the hearing examiner-the subjective complaints of appellant, despite appellee's own regulations(App. Br. 28-29) to the contrary, smacks of desperation. The Government's argument ignores the undenied factor of frequent angina pains and their being brought on by ordinary activity./ See Haskins v. Finch, 307 F. Supp.1384(W.D.Mo.1970).
The Government contends that appellant's assertion of four heart attacks between October 1947 and his 1948 medical examination "was found to be absolutely unsupported by the subsequent examination which in fact showed evidence of a healed infarction" (Goc. Br.8). This is another example of the deceptive nature of the Government's brief. Not only was there no such finding but the Government does not refer to the 1948 finding of residuals of posterior myocardial infarction and that it was impossible to determine present activity of myocardial process without serial EKG's,and that during the 1947-48 period he was rated as 100% disabled(App. Br.6,8).

Appellee argues that a worsening of a condition cannot be considered(Gov. Br.8, 16n.20), although an alleged healing(Gov. Br.8), or an alleged improvement(Gov. Br.9) may. Its cases do not support such proposition. Just how one determines the consequences of a heart attack without observing what happens thereafter it does not say. And, of course, as the cases show(App. Br.15), the best way to judge future consequences of something that has happened, is, when possible, to observe what did happen. We notethat since Mr. Meneses died of a myocadial infarction heart attack any suggestion of a haling seems oddly out of place.

The Government, which in its counter statement -woefully misleading as it is-found it necessary to expand considerably on the hearing examiner's review of the facts, says that because the hearing examiner did not discuss every shred of evidence did not mean that he ignored such evience. But the trouble with such an argument is that not only did he not discuss a great deal of substantial evidence including such as materially qualified that which he referred to but he also misstated some of the substantial evidence. And what better evidence of what the hearing examiner didwith the evidence than his opinion which purports to review the evidence.

3. Job Availibility.

Appellee argues(G. Br. 12-14) that appellee did not have the burden of proving the availability of specific work opportunities for appellant. This is a red herring argument since this is not appellant's contention. It is our contention, as notedin our main brief(pp.17-23), that once the applicant has shown that he has a medical impairment which prevents him from returning to his former type of work, the Government has the burden of going forward to show the availability of job opportunities for persons in his condition and with his background. The Government does not deny that this has been the established rule. It contends, however, that a 1967 Amendment to the Act has changed this rule. It refers to no legislative history to support such a proposition, and that proposition is not supported by the cases it cites.

The 1967 amendment to the Act made it enough for the Government to show such availability in any region of the country rather than in the region where the applicant lived; it also made clear (there was some difference on this score) that if jobs were available which he was capable of performing he could not show that employers would not take him on. A number of the cases cited on pages 18 an 40 of our main brief were decided after the date of the 1967 amendment. See also the recent case of Selewich v. Finch, 312 F. Supp. 191(D. Mass. 1969). And see Haskins v. Finch, supra n.2 and the test still is that the work available must be substantially gainful. Stewart v. Cohen, 309 F. Supp. 949(E.D.N.Y. 1969). Appellee's argument would require a

a disabled claimant in St Albans, Vermont, to show not only that jobs he could do were not available not only in Vermont but also not in Alaska , California and Hawaii. No statute should be so construed in the absence of clear language or clear legislative history to that effect.

4. Absence of oral or adequate hearing.

In answer to our argument as to the failure to afford the claimant with an oral hearing or an adequate review of the evidence(App. Br. 22 et seq.), the Government says he failed to ask for a hearing in the Philippines which he could have had. This argument is not a credit to the Government. In the first instance it omits reference to the fact that appelleehad given the claimant written notice that an oral hearing in the Philippines could not be provided.Tr.98. An oral inquiry made by counsel for appellant on August 14, 1970 to the office of Hearings and Appeals of Social Security elicited the response that oral hearings are not had in the Philippines but are considered here on the record. In the Court below counsel for appellant argued strenuously that appallee couldhave provided a hearing for appellant in the Philippines through use of the Veterans Administration Office in Manila, through the State Department, and that argument was controverted by the Government.

As to a right to an oral hearing, see also Goldberg v. Kelley, 90 Sup. Ct. Caldwell v. Laupheisner, 311 F. Supp.853(E.D.Pa.1969); Davis v. 1011(1970): Wheeler v. Montgomery, 90 Sup. Ct. 1026(1970),/As to the extra burden Toledo H.H.A., 311 F. Supp.795(N.D.Ohio 1970)
on the appellee and on the courts to procure available evidence where an applicant is not represented by counsel, see Stewart v. Cohen, 309 F. Supp.949(E.D.N.Y.1969); Erwin v. Secretary, 312 F. Supp. 179(D.N.J.1970)

We think that that duty, when the claimant had authorized apellee to look at his VA file included the obligation to review the whole of that file. To counsel for the appellant who was a government attorney for many years, it is difficult to understand that when he procured that VA file from the Philippines a year ago and advised government counsel that it contained evidence which should have been considered by the hearing examiner no interest on the government(s part

to examine such file was evidenced. That file was returned to the Philippines by the Veteran's Administration Office here but counsel for appellant has asked that that file be sent here again and expects that it will be available by late next month. Counsel made elaborate notes when he reviewed that file but has not been able to locate them. Aside from what is mentioned on page 39 of our brief, counsel recalls that it contained information as to appellant's death and the cause thereof and has a reference indicating that some of the children referred to in the hearing examiner's opinion had been adopted and were not born by the applicant.

Respectfully submitted

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August , 1970